

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

APPLETON PAPERS INC. and
NCR CORPORATION,

Plaintiffs,

v.

Case No. 08-CV-00016-WCG

GEORGE A. WHITING PAPER COMPANY,
P.H. GLATFELTER COMPANY,
MENASHA CORPORATION,
GREEN BAY PACKAGING, INC.,
INTERNATIONAL PAPER COMPANY,
LEICHT TRANSFER & STORAGE COMPANY,
NEENAH FOUNDRY COMPANY,
NEWPAGE WISCONSIN SYSTEM INC.,
THE PROCTER & GAMBLE PAPER
PRODUCTS COMPANY, and
WISCONSIN PUBLIC SERVICE CORP.

Defendants.

**DEFENDANT'S, GREEN BAY PACKAGING, INC., ANSWER TO THIRD AMENDED
COMPLAINT AND COUNTERCLAIM**

Defendant Green Bay Packaging, Inc., (hereafter "GBP") by its attorneys, von Briesen & Roper, s.c, provides the following answer, affirmative defenses, and counterclaim to the Plaintiffs' Third Amended Complaint:

ANSWER

1. Answering paragraph 1, GBP admits these averments.
2. Answering paragraph 2, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.
3. Answering paragraph 3, GBP admits that it entered into a tolling agreement

with API and NCR that has since been terminated by API and NCR, but is without knowledge or information sufficient to form a belief as to the truth of the remaining averments.

4. Answering paragraph 4, GBP admits that the parties disagree about their respective shares of the Lower Fox River cleanup costs and damages, but is without knowledge or information sufficient to form a belief as to the truth of the remaining averments.

5. Answering paragraph 5, GBP admits these averments.

6. Answering paragraph 6, GBP admits that venue is proper in this District, but is without knowledge or information sufficient to form a belief as to the truth of the remaining averments.

PARTIES

7. Answering paragraph 7, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

8. Answering paragraph 8, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

9. Answering paragraph 9, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

10. Answering paragraph 10, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

11. Answering paragraph 11, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

12. Answering paragraph 12, GBP admits these averments.
13. Answering paragraph 13, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.
14. Answering paragraph 14, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.
15. Answering paragraph 15, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.
16. Answering paragraph 16, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.
17. Answering paragraph 17, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.
18. Answering paragraph 18, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.
19. Answering paragraph 19, GBP admits that the Complaint concerns PCB contamination of the Lower Fox River, but is without knowledge or information sufficient to form a belief as to the truth of the remaining averments.
20. Answering paragraph 20, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.
21. Answering paragraph 21, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.
22. Answering paragraph 22, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

23. Answering paragraph 23, GBP admits to operating a mill located in Green Bay, Wisconsin, but denies that PCBs were released from that mill into the Lower Fox River Site during the time frame identified in this paragraph. GBP is without knowledge or information sufficient to form a belief as to the truth of the remaining averments.

24. Answering paragraph 24, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

25. Answering paragraph 25, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

26. Answering paragraph 26, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

27. Answering paragraph 27, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

28. Answering paragraph 28, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

29. Answering paragraph 29, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

30. Answering paragraph 30, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

31. Answering paragraph 31, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

32. Answering paragraph 32, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

33. Answering paragraph 33, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

34. Answering paragraph 34, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

35. Answering paragraph 35, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

36. Answering paragraph 36, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

37. Answering paragraph 37, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

38. Answering paragraph 38, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

39. Answering paragraph 39, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

40. Answering paragraph 40, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

41. Answering paragraph 41, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

42. Answering paragraph 42, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

COUNT I – CLAIM UNDER CERCLA § 107

43. In response to Paragraph 43 of Plaintiffs' Third Amended Complaint, GBP hereby incorporates, as if fully rewritten, its responses to the allegations contained in paragraphs 1 through 42 of the Third Amended Complaint.

44. Answering paragraph 44, the allegations in this paragraph set forth a legal conclusion, which is denied.

45. Answering paragraph 45, the allegations in this paragraph set forth a legal conclusion, which is denied.

46. Answering paragraph 46, the allegations in this paragraph set forth a legal conclusion, which is denied.

47. Answering paragraph 42, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

48. Answering paragraph 42, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

49. Answering paragraph 42, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

50. Answering paragraph 42, the allegations in this paragraph set forth a legal conclusion, which is denied.

51. Answering paragraph 42, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

52. Answering paragraph 42, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

53. Answering paragraph 53, GBP is without knowledge or information sufficient

to form a belief as to the truth of these averments.

54. Answering paragraph 54, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

55. Answering paragraph 55, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

56. Answering paragraph 56, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

57. Answering paragraph 57, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

58. Answering paragraph 58, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

59. Answering paragraph 59, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

60. Answering paragraph 60, the allegations in this paragraph set forth a legal conclusion, which is denied.

61. Answering paragraph 61, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

62. Answering paragraph 62, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

63. Answering paragraph 63, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

64. Answering paragraph 64, GBP is without knowledge or information sufficient

to form a belief as to the truth of these averments.

65. Answering paragraph 65, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

66. Answering paragraph 66, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

67. Answering paragraph 67, GBP admits these averments.

68. Answering paragraph 68, GBP admits these averments.

69. Answering paragraph 69, the allegations in this paragraph set forth a legal conclusion, which is denied.

70. Answering paragraph 70, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

71. Answering paragraph 71, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

72. Answering paragraph 72, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

73. Answering paragraph 73, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

74. Answering paragraph 74, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

75. Answering paragraph 75, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

76. Answering paragraph 76, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

77. Answering paragraph 77, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

78. Answering paragraph 78, GBP is without knowledge or information sufficient to form a belief as to the truth of the averment that papermaking activities conducted by GBP at its mill resulted in the release of PCBs into the Lower Fox River Site, and affirmatively alleges that any PCB releases that did occur resulted in whole or in part from the PCB releases caused by API, NCR and other named and unnamed parties in their respective wastewater discharges to the Lower Fox River. The remaining allegations in this paragraph set forth a legal conclusion, which is denied.

79. Answering paragraph 79, the allegations in this paragraph set forth a legal conclusion, which is denied.

80. Answering paragraph 80, the allegations in this paragraph set forth a legal conclusion, which is denied.

81. Answering paragraph 81, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

82. Answering paragraph 82, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

83. Answering paragraph 83, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

84. Answering paragraph 84, GBP is without knowledge or information sufficient

to form a belief as to the truth of these averments.

85. Answering paragraph 85, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

86. Answering paragraph 86, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

87. Answering paragraph 87, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

88. Answering paragraph 88, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

89. Answering paragraph 89, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

90. Answering paragraph 90, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

91. Answering paragraph 91, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

92. Answering paragraph 92, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

93. Answering paragraph 93, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

94. Answering paragraph 94, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

95. Answering paragraph 95, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

96. Answering paragraph 96, the allegations in this paragraph set forth a legal conclusion, which is denied.

97. Answering paragraph 97, the allegations in this paragraph set forth a legal conclusion, which is denied.

98. Answering paragraph 98, the allegations in this paragraph set forth a legal conclusion, which is denied.

99. Answering paragraph 99, the allegations in this paragraph set forth a legal conclusion, which is denied.

100. Answering paragraph 100, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

101. Answering paragraph 101, the allegations in this paragraph set forth a legal conclusion, which is denied.

COUNT II – CLAIM UNDER CERCLA § 113

102. In response to Paragraph 102 of Plaintiffs' Third Amended Complaint, GBP hereby incorporates, as if fully rewritten, its responses to the allegations contained in paragraphs 1 through 101 of the Third Amended Complaint.

103. Answering paragraph 103, the allegations in this paragraph set forth a legal conclusion, which is denied.

104. Answering paragraph 104, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

105. Answering paragraph 105, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

106. Answering paragraph 106, the allegations in this paragraph set forth a legal conclusion, which is denied.

COUNT III – CLAIM FOR DECLARATORY RELIEF

107. In response to Paragraph 107 of Plaintiffs' Third Amended Complaint, GBP hereby incorporates, as if fully rewritten, its responses to the allegations contained in paragraphs 1 through 106 of the Third Amended Complaint.

108. Answering paragraph 108, GBP is without knowledge or information sufficient to form a belief as to the truth of these averments.

109. Answering paragraph 109, GBP denies that it is liable to plaintiffs as alleged, but is without knowledge or information sufficient to form a belief as to the truth of the remaining averments.

110. Answering paragraph 110, GBP denies these averments.

111. Answering paragraph 111, the allegations in this paragraph set forth a legal conclusion, which is denied.

AFFIRMATIVE DEFENSES

112. Plaintiffs' claims fail to state a claim upon which relief may be granted.

113. Plaintiffs' claims are barred in whole or in part by the applicable statute of limitations.

114. Plaintiffs' claims are barred in whole or in part by the doctrine of unclean hands in that harm to the environment is the result of the negligence of Plaintiffs and/or other

persons.

115. Plaintiffs' claims are barred by the doctrine of laches and/or waiver.

116. Plaintiffs have failed to comply with the requirements of the National Contingency Plan and, therefore, cannot be reimbursed for expenses they may have incurred or may later incur.

117. Plaintiffs' damages, if any, are the result of their own acts or omissions over which GBP has no control.

118. GBP's liability, if any, is the result of acts of a third persons within the meaning of 42 U.S.C. § 9607(b)(3) over whom GBP has no control.

119. Plaintiffs' claims for recovery of response costs are barred in that a reasonable basis exists for allocation of liability in that the alleged environmental harm was caused entirely by the production or reprocessing of carbonless paper in which GBP was not directly or indirectly involved.

120. The contribution to the PCB contamination of the Lower Fox River through GBP, if any, is so infinitesimal such that any allocation of liability to GBP would be inequitable.

121. Pursuant to the Small Business Liability Relief and Brownfields Revitalization Act and Section 107(o) of CERCLA, 42 U.S.C. §9607(o), GBP is exempt from liability as a de micromis party, if it has any liability at all.

122. Plaintiffs' claims are barred because they are not ripe for adjudication and/or Plaintiffs lack standing to assert them.

123. Plaintiffs are not the real party in interest to make a claim for natural resource damages.

124. Plaintiffs have failed to name all necessary and indispensable parties.

WHEREFORE, Defendant Green Bay Packaging, Inc. prays that all of the claims asserted in Plaintiffs' Third Amended Complaint be dismissed, with prejudice, at Plaintiffs' costs, and that this Court grant GBP such other and further relief as this Court deems just and proper, including an award of GBP's attorney's fees, expenses, disbursements and costs.

COUNTERCLAIM

Defendant, Green Bay Packaging, Inc., ("GBP"), by and through its undersigned counsel and, to the extent Plaintiffs' Third Amended Complaint states a claim, sets forth its counterclaims as follows:

1. Defendant, Green Bay Packaging, Inc., ("GBP"), is a Wisconsin Corporation with its principal place of business in Green Bay, Wisconsin.
2. Plaintiff, Appleton Papers, Inc. ("API"), is a Delaware corporation with its principal place of business in Appleton, Wisconsin.
3. Plaintiff, NCR Corporation, is a Maryland corporation with its principal place of business in Dayton, Ohio.
4. This Court has jurisdiction over the subject matter of this counterclaim pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, as amended by the Superfund Amendments and the Authorization Act of 1986, 42 U.S.C. § 9601, *et seq.* ("CERCLA"), 28 U.S.C. § 1331, and supplemental jurisdiction.
5. Venue is proper in this District pursuant to 42 U.S.C. § 9613(b) and 28 U.S.C. § 1391(b), because the events giving rise to the claims in this Counterclaim and in Plaintiffs' Third Amended Complaint, including the alleged releases of hazardous substances, occurred in

this District. In addition, the Lower Fox River and Plaintiffs' relevant businesses or operations are/were located entirely within this District.

6. The Third Amended Complaint alleges claims for liability against GBP, which claim GBP denies.

7. Plaintiffs are liable for response costs or damages incurred, or to be incurred, for PCB contamination of the Lower Fox River Site as those terms are defined in Plaintiffs' Third Amended Complaint.

8. To the extent that the Third Amended Complaint states a claim for liability for response costs or damages at the Lower Fox River Site, and results in a judgment against Defendant Green Bay Packaging, Inc., GBP is entitled to statutory and/or common law contribution, cost recovery, and/or indemnity from Plaintiffs.

WHEREFORE, GBP demands judgment against Plaintiffs dismissing the Third Amended Complaint on the merits or, in the event judgment is rendered against Green Bay Packaging, Inc., for judgment against Plaintiffs for costs and damages properly allocable to them, for such other and further relief as this Court deems just and proper, and for its attorneys' fees, costs, disbursements and expenses of this action.

Dated this 30th day of May, 2008.

von BRIESEN & ROPER, s.c.

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